REVIEWS

The Austinian Theory of Law. W. Jethro Brown, LL.D., Litt. D. Professor of Comparative Law in the University College of Wales, London. John Murray, 1906. pp. xvi, 383.

The form in which the work of John Austin has been preserved has hardly done justice to what that work really was. A law lecturer, like a jury lawyer, must not disdain the practice of repetition. Every man to whom he speaks will not hear everything that is said. Most of them will fail to retain in their minds much that is said, unless it be presented to them from different points of view or, at least, more than once in different forms of words. A good book is seldom written in that way. Austin's lectures were never thoroughly revised for publication. Professor Brown has now taken the most important of them, cut out a third of these, and added over a hundred pages of what is partly a criticism and partly a defence of the Austinian doctrine. He has had especially in view the wants of law teachers and law students, and in notes suggests many questions skilfully framed with a view of helping the latter to test the adequacy of Austin's definitions, by applying them to concrete cases.

Austin was nothing if not logical, and, having adopted his premises, argued from them without flinching, wherever he might be carried. Law came from sovereign power. Sovereign power must be the supreme power. Therefore no government could be at once sovereign and subject, that is, "imperfectly supreme" (p. 139). Professor Brown, differing here from Burgess and Willoughby, says that, as to this, Austin was sacrificing essentials to verbal precision and taking an unhistorical position (p. 141).

In his supplementary chapters, (*excursus*, as he styles them) the author denies that to ascribe personality to a corporation is to adopt a legal fiction. It is a real, though not a physical person. "It is a representation of physical realities, which the law recognizes rather than creates." (p. 264.)

James C. Carter's presentation of the theory that Judges make no law is sharply criticised as a bundle of fallacies (p. 289), in which no distinction is made between the sources from which laws have taken their origin as rules, and the sources from which laws have taken their title to rank as rules which the state will enforce. Judicial precedents find their main office in limiting the power of judges in judgments thereafter rendered (p. 296.) They are parts of a long process of judicial thought, slowly working, in case after case, towards conclusions which, at the beginning, were "felt dimly or not at all." (p. 297).

Occasionally one meets with what seems an unguarded statement, as where (p. 298) it is said that if the House of Lords, on appeal, should construe a statute in a certain way, and Parliament should afterwards declare that it meant the contrary, "the

declaration would be accepted by all courts as final." Such a declaratory act could hardly be permitted to disturb interests vested under the preceding judgment.

Professor Brown gives the American courts credit for inquiring as to the governing principles more than for a governing case. (p. 300.) He recognizes the English tendency towards what Lambert has called *la superstition du cas*, and insists that what the beginner in the study of law needs first is a treatise on elementary law. (p. 370.)

The style of the author is simple and clear. His reading has been extensive, and he quotes from the best words of many men. It is in a friendly spirit that he takes up the Austinian theory, but as one that is "*Nullius addictus jurare in verba magistri.*"

He makes it plainer than Austin himself did; but by putting it in so strong a light that defects are called to the reader's attention which might otherwise have escaped it. *S. E. B.*

Remsen on the Preparation and Contests of Wills. (With plans of and extracts from important wills.) Daniel S. Remsen, of the N. Y. Bar. Baker, Voorhis & Company, 1907.

As stated in the preface, the purpose of this book is to assist lawyers in three important professional duties, namely: in planning a suitable will; in preparing a will that shall, without controversy and against legal attack, effect the testator's purpose; in determining when and by whom probate may be successfully contested. The chapters stating by whom and on what grounds wills may be contested are elementary and are not a valuable feature of the author's work, in fact, they do not belong in a book primarily intended to guide the professional adviser in the work of *ante mortem* creation rather than that of *post mortem* destruction.

The most obvious duty of the lawyer called upon to draft a will is to put the scheme of the testator into clear, concise and effective language. But equally important, though less obvious, is his duty to assist the testator in forming a complete scheme—in doing which he must call to his imagination every possible event of life, death, change of property and of circumstance during the testator's life and afterwards which may interfere with or affect the testator's plan, and must subject the scheme to the test of every such possibility. He must also, especially if the testator's scheme involves a postponement of complete distribution or title, consider the details of possession and administration so that the scheme may be carried out to completion with the least inconvenience, perplexity and loss to those concerned. When he finally drafts the will, he should be able to express the scheme of disposition and administration in such form that others in future years may not merely understand it but may have no excuse for misunderstanding. The lawyer, at all stages of his work, must know and apply the law concerning the subject-matter, that is, such law as is collated and digested in our several standard treatises on wills.